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No. PD-1070-19

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

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COURT OF CRIMINAL APPEALS
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DEANA WILLIAMSON, CLERK

ROBERT LEE CRIDER, JR., Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Kerr County

* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

Stacey M. Soule
State Prosecuting Attorney
Bar I.D. No. 24031632

John R. Messinger
Assistant State Prosecuting Attorney
Bar I.D. No. 24053705

P.O. Box 13046
Austin, Texas 78711
information@spa.texas.gov
512/463-1660 (Telephone)
512/463-5724 (Fax)

ORAL ARGUMENT REQUESTED

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No. PD-1070-19

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

ROBERT LEE CRIDER, JR., Appellant

v.

THE STATE OF TEXAS, Appellee

* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

A person arrested for driving while intoxicated has no legitimate expectation of privacy in his blood alcohol content. If he did, a warrant that authorizes the seizure of his blood as evidence of DWI either necessarily authorizes testing for BAC or sufficiently frustrates any legitimate expectation of privacy.

STATEMENT REGARDING ORAL ARGUMENT

The Court granted oral argument. The State intends to appear.

ISSUE PRESENTED

Does the State have to obtain a separate warrant to analyze the alcohol content of blood obtained with a warrant based on probable cause it contains alcohol?

STATEMENT OF FACTS

Appellant was arrested for driving while intoxicated.[1] The officer applied for and received a warrant to obtain a sample of appellant's blood based on his belief that it "constitutes evidence" appellant committed that offense.[2] The warrant adopted the officer's allegations and authorized the seizure of appellant's blood.[3] The warrant did not explicitly authorize the necessary testing, which revealed a BAC of .194.[4]

SUMMARY OF THE ARGUMENT

A warrant that authorizes venipuncture because of probable cause to believe the blood constitutes evidence of DWI implicitly authorizes analysis to verify that belief. Common sense and case law demand it. Even if they did not, there is no legitimate expectation of privacy in BAC. The Supreme Court said so in *Birchfield v. North Dakota*. Because appellant's blood was lawfully obtained and testing his BAC implicated no protected privacy interest, he has nothing to complain about.

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[1] 8 RR 12.

[2] 13 RR 3 (PDF pagination) (Def. Ex. 1). *See also id.* at 6 (requesting a warrant authorizing search of appellant's person for his blood "as evidence" of DWI).

[3] *Id*. at 7.

[4] 8 RR 13; 13 RR 25 (State's Ex. 3).

ARGUMENT

I. *Martinez* does not say what appellant says it says.

Appellant says *State v. Martinez*[5] established this "bright-line rule":

> Regardless of how the government obtains a blood sample—whether it is pursuant to a warrant or from a third-party that took the sample solely for medical purposes, any subsequent analysis of that sample by the government is a "search" under the Fourth Amendment that must be justified by a search warrant or a valid warrant exception.[6]

Appellant is half right, but not about the half that matters.

Martinez held "that there is an expectation of privacy in blood that is drawn for medical purposes"[7] such that "the State's subsequent testing of [such] blood was a Fourth Amendment search separate and apart from the seizure of the blood by the State."[8] The State lost because it had no warrant (and no exception) authorizing its analysis.[9] *Martinez* did not say that a warrant or exception is required no matter how the blood is obtained, even by implication. It thus does not answer the question presented in this case. As shown below, *Martinez* doesn't even help.

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[5] *State v. Martinez*, 570 S.W.3d 278 (Tex. Crim. App. 2019).

[6] App. Br. at 16 (emphasis in original). Appellant also says *Martinez* "unequivocally holds that the government's actions in subjecting a defendant's blood to testing at the DPS laboratory constitutes a search regardless of whether the blood was drawn pursuant to a warrant or pursuant to medical procedures unrelated to a criminal investigation." App. Br. at 15.

[7] *Martinez*, 570 S.W.3d at 291.

[8] *Id*. at 292.

[9] *Id*.

II. A blood seizure warrant for BAC authorizes testing for BAC.

Appellant's argument is predicated on the assumption that the warrant in this case did not authorize BAC testing. According to the standards by which warrants are viewed and decades of Fourth Amendment case law, the warrant necessarily authorized the BAC testing that was performed.

A. Reading a seizure warrant to authorize analysis within its scope is reasonable, or, "What did you think they were going to do with it?"

The ultimate touchstone of the Fourth Amendment is "reasonableness."[10] Part of "reasonableness" is viewing the entire warrant process in a common-sense manner. Probable cause is "a flexible, common-sense standard."[11] The magistrate's task when confronted with the application "is simply to make a practical, common-sense decision" that probable cause exists.[12] And all courts, issuing or reviewing, must interpret affidavits for search warrants "in a common sense and realistic manner."[13]

The magistrate in this case signed a warrant to obtain a sample of appellant's blood because there was probable cause to suspect it constituted evidence of DWI, *i.e.*, it contained alcohol or other substances. Common sense dictates that a warrant

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[10] *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006).

[11] *Texas v. Brown*, 460 U.S. 730, 742 (1983).

[12] *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

[13] *State v. Elrod*, 538 S.W.3d 551, 556 (Tex. Crim. App. 2017) (quotation omitted). *See also State v. Le*, 463 S.W.3d 872, 879-80 (Tex. Crim. App. 2015) (viewing "the independent and lawfully acquired information in the search-warrant" "as a whole and in a common-sense manner").

authorizing the seizure of a container because it might contain something that must be discovered through analysis implicitly authorizes that analysis.

B. The courts that have addressed this precise scenario agree.

The Supreme Court of Washington perhaps said it best:

> The purpose of the warrant was to draw a sample of blood . . . to obtain evidence of DUI. It is not sensible to read the warrant in a way that stops short of obtaining that evidence. A warrant authorizing a blood draw necessarily authorizes blood testing, consistent with and confined to the finding of probable cause. The only way for the State to obtain evidence of DUI from a blood sample is to test the blood sample for intoxicants.[14]

After reiterating that it was applying "a commonsense reading to the warrant," the court upheld the search because it did not exceed the scope of the warrant.[15] Other state courts have adopted this approach, *i.e.*, that a warrant that authorizes the seizure of blood for that stated purpose implicitly authorizes analysis for that stated purpose.[16]

C. This is not a new idea.

This rationale is consistent with Professor LaFave's position that "it is generally understood that a lawful seizure of apparent evidence of a crime pursuant

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[14] *State v. Martines*, 355 P.3d 1111, 1115 (2015).

[15] *Id*. at 1116.

[16] *See State v. Swartz*, 517 S.W.3d 40, 49-50 (Mo. Ct. App. 2017) (blood testing upheld because it was confined to locating evidence consistent with the probable cause that justified its seizure); *State v. Frescoln*, 911 N.W.2d 450, 456 (Iowa Ct. App. 2017) ("[A] commonsense reading of the warrant implies the blood sample would be subjected to chemical testing.").

to a search warrant carries with it a right to test or otherwise examine the seized materials to ascertain or enhance their evidentiary value[.]"[17] He attributes the lack of litigation on this point to that general understanding.[18] And that understanding is justified by decisions in other contexts across decades.

Nearly thirty years ago, the Supreme Court of Wisconsin held that a warrant permitting the seizure of all pictures and film based on probable cause that it contained images of nude juveniles necessarily authorized law enforcement to develop the film.[19] Its reasoning paralleled that of the blood cases, above:

> Developing the film made the information on the film accessible, just as laboratory tests expose what is already present in a substance but not visible with the naked eye. Developing the film did not constitute, as the defendant asserts, a separate, subsequent unauthorized search having an intrusive impact on the defendant's rights wholly independent of the execution of the search warrant. The deputies simply used technological aids to assist them in determining whether items within the scope of the warrant were in fact evidence of the crime alleged.[20]

Federal practice regarding searches of electronic media is also instructive. In *United States v. Fifer*, the defendant complained that the warrant authorized the seizure of cell phones and a tablet but did not authorize the on-site searches

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[17] 2 Wayne R. LaFave, Search and Seizure § 4.10(e), at 988-89 (5th ed. 2012).

[18] *Id*. at 989.

[19] *State v. Petrone*, 468 N.W.2d 676, 681 (Wis. 1991), *overruled on other grounds*, *State v. Greve*, 681 N.W.2d 479, 489 (Wis. 2004).

[20] *Id*.

conducted.[21] The Seventh Circuit said that "the most reasonable interpretation" of the warrant was that it implicitly authorized a search of those devices:

> After all, the whole point of a search warrant is to authorize police to *search* for evidence of a crime. And it seems inescapable that if there's probable cause to seize an object because it might contain evidence of a crime, then there's also probable cause to search the object for the evidence it might contain. Why, then, would the issuing judge order the police to seize an item—such as a computer, a phone, or even a safe (all listed in the warrant)—only to have them reapply for an essentially identical warrant to search the item seized?[22]

This argument, like that in the blood cases mentioned above, also appears based in part on scope; the basis for the seizure of Fifer's electronic devices was suspicion they contained the digital data searched for.[23] The First, Sixth, and Eighth Circuits also hold that a warrant authorizing the seizure of a device and data, or a device because it might contain that data, authorizes a search of the device to see if it does contain data.[24] This concept was so accepted that the Federal Rules of Criminal

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[21] *United States v. Fifer*, 863 F.3d 759, 766 (7th Cir. 2017, cert. denied).

[22] *Id*. (emphasis in original).

[23] *Id*.

[24] *United States v. Evers*, 669 F.3d 645, 652 (6th Cir. 2012) ("[A] second warrant to search a properly seized computer is not necessary where the evidence obtained in the search did not exceed the probable cause articulated in the original [seizure] warrant.") (internal quotation omitted), *id*. at 653 (warrant authorizing seizure of equipment and photos was "specifically designed [although not explicitly worded] not simply to permit the officers to seize the computer and digital camera, but to view the computer and the digital camera, to have access to them"); *United States v. Gregoire*, 638 F.3d 962, 967-68 (8th Cir. 2011) (search warrant for devices and financial records authorized a search of the seized computer for relevant financial records one year later); *United States v. Upham*, 168 F.3d 532, 536-37 (1st Cir. 1999, cert. denied) (warrant explicitly authorizing the seizure of both the computer (plus diskettes) and the unlawful images contemplates extraction of unlawful images (continued...)

Procedure were amended to "authorize[] a later review of the media or information consistent with the warrant," including warrants authorizing "the seizure of electronic storage media," unless otherwise specified.[25]

D. The Supreme Court came to the same conclusion on parallel facts.

In *Birchfield v. North Dakota*, the Supreme Court held that a breath test (but not a blood test) for BAC could be performed as a search incident to arrest.[26] Its analysis included an explanation, in practical terms, of why judicial review of one's privacy interest in BAC following an arrest for DWI "would impose a substantial burden but no commensurate benefit."[27] Its reasoning applies here.

First, a search warrant application "would typically recite the same facts that led the officer to find that there was probable cause for arrest, namely, that there is probable cause to believe that a BAC test will reveal that the motorist's blood alcohol level is over the limit."[28] "A magistrate would be in a poor position to challenge such characterizations."[29] Second, a magistrate is not needed to delineate the scope of the

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[24](...continued)
inside the computer or diskettes, calling any contrary argument "hopeless").

[25] FED. R. CRIM. P. 41(e)(2)(B) (Mar. 26, 2009, eff. Dec. 1, 2009).

[26] *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2184 (2016).

[27] *Id*. at 2181-82.

[28] *Id.* at 2181.

[29] *Id.*

search because the scope would be the same in all cases—a test for BAC.[30] When these conditions are satisfied—probable cause and testing limited to BAC—an arrestee's interest in not having his BAC ascertained is simply not worth the judicial resources obtaining a warrant would consume.

The Supreme Court is thus satisfied that a valid, warrantless arrest for DWI is good enough to test for BAC without judicial review so long as there is no blood draw. The same should be true of analysis performed after a valid warrant authorizes the blood draw. There's simply no need to re-approach the magistrate for the same review on the same facts.

E. Separating the taking from the testing creates absurd results.

The absurdity of arbitrarily separating a permissible investigative seizure for evidence of DWI from the testing that reveals that evidence is illustrated by how courts have universally approached exigent-circumstances blood draws since *Schmerber v. California*.[31]

Martinez was correct that, in the abstract, a defendant has distinct privacy interests in his bodily integrity and in the "informational dimension" of his blood. Yet no court has held that an exigent blood draw requires a warrant to permit testing. Why not? As a plurality of the Wisconsin Supreme Court points out, "the exigency

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[30] *Id.*

[31] 384 U.S. 757 (1966).

that justifies a non-consensual blood draw never persists beyond the point the State acquires the sample."[32] That is, once the blood sample is obtained, the State has all the time in the world to obtain a separate warrant to "search" the blood. Are all warrantless blood tests following an exigent blood draw unconstitutional? That is absurd, but it follows from appellant's argument.

The answer must be that a warrant exception that places blood in the State's possession because it probably contains evidence of DWI also authorizes the State to test for evidence of DWI at any future point.[33] The same should be true for a warrant.

III. Appellant had no legitimate expectation of privacy in his BAC.

Holding that a warrant authorizing seizure of BAC implicitly authorizes BAC testing would be the quickest way to resolve this case. A more involved way would be recognizing that there was no "search" of appellant's blood for BAC because appellant had no legitimate expectation of privacy in his BAC.

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[32] *State v. Randall*, 930 N.W.2d 223, 235 (Wis. 2019) (plurality).

[33] *See United States v. Snyder*, 852 F.2d 471, 474 (9th Cir. 1988) (holding that subsequent testing of lawfully obtained blood "has no independent significance for fourth amendment purposes").

A. Arrest defeats the privacy interest in BAC because there isn't any.

The proper way to approach a "search" issue is to determine whether there is a "search" at all.[34] In this case, that means asking whether the State infringed on a legitimate expectation of privacy when it tested appellant's blood for BAC. The answer is "no," even if there had been no seizure warrant.

In *Birchfield*, the Supreme Court held that a breath test for BAC could be performed incident to arrest because it "does not 'implicat[e] significant privacy concerns.'"[35] This means that, as it pertains to obtaining that single aspect of blood's "informational dimension,"[36] no additional justification is required.[37] The significance of this holding cannot be understated. It is crucial to remember that searches incident to arrest do not have to be tied to the offense of arrest *or any other offense*; they can be performed as a matter of course regardless of individualized suspicion.[38] Nothing in *Birchfield* created a special rule for the BAC context. So

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[34] *United States v. Jacobsen*, 466 U.S. 109, 122 (1984) ("We must first determine whether this can be considered a 'search' subject to the Fourth Amendment–did it infringe an expectation of privacy that society is prepared to consider reasonable?").

[35] 136 S. Ct. at 2178 (quoting *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 626 (1989)) (alterations in *Birchfield*).

[36] *Martinez*, 570 S.W.3d at 292 (quoting *State v. Granville*, 423 S.W.3d 399, 426 (Tex. Crim. App. 2014) (Keller, P.J., concurring)).

[37] *United States v. Robinson*, 414 U.S. 218, 235 (1973).

[38] *Id.* ("The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon

(continued...)

while *Birchfield*'s "search-incident-to-arrest" analysis was necessarily tied to the context of a DWI arrest, expectation of privacy in BAC was not. In short, whatever privacy interest a person has in his BAC can be defeated by *any* arrest[39] regardless of whether there is any reason to believe he committed an intoxication offense.[40] That is how little the Supreme Court values an individual's desire to keep his BAC secret.

B. The other privacy interests relied upon in *Birchfield* have no place in a traditional suppression analysis.

To be clear, *Birchfield* came to different results for breath tests and blood tests. But that had nothing to do with expectation of privacy in BAC.

The Supreme Court held that blood tests for BAC are not permissible under the search-incident-to-arrest exception for two reasons. First, blood tests, while "involv[ing] little pain or risk," are "significantly more intrusive than blowing into a tube."[41] Second, the person tested might feel anxiety over the government's access to the additional information in blood "[e]ven if the law enforcement agency is

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[38](...continued)
the person of the suspect.").

[39] This presumably includes informal and imminent arrest. *See Dowthitt v. State*, 931 S.W.2d 244, 255 (Tex. Crim. App. 1996) (outlining four general situations which may constitute custody); *State v. Sanchez*, 538 S.W.3d 545, 550 (Tex. Crim. App. 2017) ("If an officer has probable cause to arrest, a search incident to arrest is valid if it is conducted before a formal arrest—at least if it is immediately before the arrest.").

[40] Of course, it is doubtful officers would spend resources on breath tests when intoxication is irrelevant or unsuspected.

[41] *Birchfield*, 136 S. Ct. at 2178.

precluded from testing the blood for any purpose other than to measure BAC."[42] That is, the scope of the analysis *actually* performed does not matter when determining whether *any* blood test can be performed as a "search incident to arrest." *Birchfield* was thus decided primarily on anxiety over tests that might never happen.

This case should be decided on reality. The vast amount of information that could be extracted from blood is an important consideration when, as in *Birchfield*, a court is deciding whether to create a categorical rule that a particular item can be searched solely by virtue of arrest.[43] When a search is unlimited in scope and justified without individualized suspicion, assessing the individual's potential exposure is crucial to properly balancing his interests against society's in the abstract. But potential exposure is irrelevant in a typical suppression case like this one, where the issues are whether a "search" occurred and, if so, whether to apply the exclusionary remedy. Review of the purpose behind suppression makes this clear.

As it pertains to a prosecution—this Court's purview—exclusion is not an option unless evidence is obtained in violation of the Fourth Amendment and is

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[42] *Id*.

[43] *Accord Riley v. California*, 573 U.S. 373, 393-97 (2014) (declining to allow search of cellular phones incident to arrest because of the quantity and quality of the personal information they contain). It should be noted that, unlike emptying an arrestee's pockets, which will reveal its contents, and a search for a picture in a cell phone, *see Granville*, which could reveal other pictures, there is no realistic possibility that a blood test for BAC could accidentally reveal any other information.

admitted into evidence. That was the impetus for the creation of the remedy[44] and its application to the states,[45] and it continues to be its sole purpose.[46] It makes no sense to consider theoretical invasions of privacy that, even if realized, could not affect the verdict because the illegally obtained information was never offered by the State. And even if exclusion of BAC based on unoffered "evidence" obtained at the same time as BAC were an option, it would serve no deterrent function in the vast majority of cases like this in which there is no evidence any extraneous testing occurred.[47] And even if there was blood testing beyond BAC, a defendant can use 42 U.S.C. § 1983 or other civil remedies to vindicate his personal privacy rights,[48] which are distinct from the interests at play with the exclusionary rule.[49]

In short, the only part of *Birchfield* that matters in this case is the Supreme Court's conclusion that no one—especially no one arrested for intoxicated driving,

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[44] *Weeks v. United States*, 232 U.S. 383, 393-94 (1914).

[45] *Mapp v. Ohio*, 367 U.S. 643, 646-48 (1961).

[46] *Herring v. United States*, 555 U.S. 135, 139 (2009) ("[O]ur decisions establish an exclusionary rule that, when applicable, forbids the use of improperly obtained evidence at trial.").

[47] *See id*. at 144 ("To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.").

[48] *See Hudson v. Michigan*, 547 U.S. 586, 596-98 (2006) (explaining how the creation and expansion of civil remedies serves adequate deterrent without the societal cost of exclusion).

[49] *Davis v. United States*, 564 U.S. 229, 236-37 (2011) ("Exclusion is not a personal constitutional right, nor is it designed to redress the injury occasioned by an unconstitutional search[; t]he rule's sole purpose . . . is to deter future Fourth Amendment violations.") (quotations and citations omitted).

as appellant was—has a legitimate interest in privacy in their BAC. Whether it is obtained with breath or blood is irrelevant. As the Wisconsin Supreme Court said: "The method by which an arrestee is searched does not affect the individual's privacy interest in the datum the search reveals. The arrestee is either entitled to keep that information secret, or she is not. *Birchfield* teaches us that she is not."[50]

IV. A blood seizure warrant that does not implicitly authorize analysis still frustrates privacy interests in BAC.

Even if the warrant in this case did not authorize BAC analysis, and even if appellant had a legitimate privacy interest in his BAC, the magistrate's order for a blood sample frustrated whatever interests he had under *Martinez*.

Martinez confirmed this Court's holdings that a defendant has no legitimate expectation of privacy in the BAC of blood that is drawn and tested by medical

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[50] *Randall*, 930 N.W.2d at 233 (plurality) (emphasis in original). Although *Randall* was a plurality opinion, an additional three of the seven members of that court agreed that "there is no reasonable expectation of privacy in the alcohol concentration of blood that has been lawfully seized." *Id*. at 244 (Roggensack, C.J., concurring). This Court came to a more limited holding on more limited facts in *State v. Hardy*. 963 S.W.2d 516, 527 (Tex. Crim. App. 1997) ("whatever interests society may have in safeguarding the privacy of medical records, they are not sufficiently strong to require protection of blood-alcohol test results from tests taken by hospital personnel solely for medical purposes after a traffic accident."). Its analysis noted the legislative consensus on requiring BAC following accidents, *id*., and its narrow holding was reaffirmed in *State v. Huse*, 491 S.W.3d 833, 841, 843 (Tex. Crim. App. 2016), and *Martinez*, 570 S.W.3d at 292, both of which involved accidents. As the Supreme Court has recognized, however, all 50 states now have laws that condition the privilege to drive upon consent to BAC testing upon suspicion or arrest of an intoxicated-driving offense, *Birchfield*, 136 S. Ct. at 2166, not just in the event of an accident.

personnel, at least following an accident.[51] That is, the State can obtain the defendant's BAC without a warrant. The explanation is that whatever privacy interests a person has prior to a hospital drawing his blood and testing it are "frustrated by the actions of nongovernmental agents."[52] Martinez got relief because the State both obtained and tested the blood without a warrant. Appellant cannot say the same.

Appellant's interest in possessing his blood was frustrated by the warrant authorizing its extraction. A magistrate's power to frustrate privacy interests by issuing a warrant is presumably at least that of a nurse drawing blood for medical purposes. That being the case, it would be anomalous to say that the State can obtain BAC from a hospital without a warrant but not perform a limited test on a sample obtained *with* a warrant for the purpose of securing what the test revealed.

Put another way, there is no legitimate interest that was not defeated by the warrant. A judge authorized invasion into appellant's body and placed the blood—with all its "informational dimension"—in the government's hands. Everything *Birchfield* used to distinguished a blood draw from a breath sample—venipuncture and anxiety over unwarranted analysis—was made moot by

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[51] *Martinez*, 570 S.W.3d at 291.

[52] *Id*. at 285 (quoting *Hardy*, 963 S.W.2d at 526).

the warrant in this case. And the State's analysis revealed only BAC, which at most implicates insignificant privacy concerns.[53] As such, appellant has nothing to complain about.

V. *Martinez* should be reconsidered.

If comparison to *Martinez* becomes necessary, and this case is not viewed favorably in light of it, that case should be reconsidered.

Martinez got it wrong because it focused on the wrong part of *Birchfield*, *i.e.*, on abstract privacy interests in blood.[54] The issue in *Martinez* should not have been whether Martinez had *any* privacy interest in the contents of his blood such that a blood test, in the abstract, is a separate Fourth Amendment event. The focus should have been on whether Martinez had a legitimate expectation of privacy in his BAC

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[53] *Birchfield*, 136 S. Ct. at 2178.

[54] *Martinez*, 570 S.W.3d at 285 (framing the case as an opportunity "to reject [a prior plurality opinion] and declare that once a hospital draws a patient's blood for medical purposes, that patient loses any expectation of privacy in whatever private facts may be revealed by the State's later testing of that blood."), 287 (criticizing the State for not "addressing whether society would or would not consider an expectation of privacy in the drawn blood to be reasonable."), 289 (reviewing *Birchfield*'s discussion of the relative scopes of information that could be revealed by breath and blood tests), 289 (noting the importance to the holding in *Maryland v. King*, 569 U.S. 435 (2013), "that the analysis was specifically tailored to identifying the arrestees and could not reveal genetic traits and were unlikely to reveal any private medical information"), 290 (noting that *Skinner*, 489 U.S. at 617, said that "chemical analysis of urine, like that of blood, can reveal a host of private medical facts about an employee, including whether he or she is epileptic, pregnant, or diabetic"), 290 (quoting an Iowa case that called it "significant that both blood and urine can be analyzed in a medical laboratory to discover numerous physiological facts about the person from whom it came, including but hardly limited to recent ingestion of alcohol or drugs."). In fairness, it was the State that apparently raised both the third-party doctrine and abandonment. PD-0878-17, State's Br. at 11-12.

and, if not, whether the government otherwise invaded a privacy interest in that case.[55] The "informational dimension" of blood was an unintentional straw man.

Had the Court focused on the right part of *Birchfield*, it would have concluded that nothing of Fourth Amendment significance happened when the State tested Martinez's blood for BAC. The State did not invade his body, a nurse did. The State obtained the blood with no further pain or even inconvenience to Martinez, and did not discover any information he had a legitimate expectation of privacy in regardless of whether medical personnel performed the testing first. Simply put, no legitimate bodily or informational interest was impacted by government action.

The Wisconsin Supreme Court came to this conclusion on similar facts in *State v. Randall*. Following arrest for operating under the influence, Randall signed a form consenting to a test of her blood.[56] After her blood was taken but before it was tested, Randall formally revoked her consent to testing and demanded that the blood be

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[55] *Martinez*'s focus on potential extraneous revelations is especially curious given the Court's reliance on *Maryland v. King*, which upheld the DNA identification policy at issue because the search actually performed could not and did not reveal sensitive genetic information. 569 U.S. at 464. *See also Raynor v. State*, 99 A.3d 753, 768 (2014) ("That Petitioner's DNA could have disclosed more intimate information is of no moment in the present case because there is no allegation that the police tested his DNA sample for that purpose."). *Raynor* was written before *Birchfield* but after *King*.

[56] 930 N.W.2d at 225.

returned or destroyed.[57] The lab tested her blood anyway, revealing a BAC of .210.[58] A plurality of that court rejected her arguments that a warrant was required because the blood analysis was a separate search or that the blood draw and later test were "a single, continuing search."[59] It framed her privacy claim thus: "She says that, notwithstanding a constitutionally-compliant search (the blood draw), she nonetheless had a legitimate privacy interest in shielding from the State the very evidence for which it was authorized to search."[60] That cannot be, the court concluded, as *Birchfield* authorized BAC analysis "upon no greater showing than a good arrest."[61]

Randall is distinguishable from *Martinez* because Randall was arrested, but it is a distinction without a difference. Arrest or no arrest, no one has a legitimate expectation of privacy in their BAC. Randall consented to government extraction. Martinez suffered no governmental extraction. The analyses were similarly limited to reveal only information unprotected by the Fourth Amendment. The results should be the same.

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[57] *Id*.

[58] *Id*. at 226.

[59] *Id*. at 234.

[60] *Id*. at 231.

[61] *Id*. at 233.

PRAYER FOR RELIEF

WHEREFORE, the State of Texas prays that the Court of Criminal Appeals affirm the judgment of the Court of Appeals.

Respectfully submitted,

/s/ John R. Messinger
JOHN R. MESSINGER
Assistant State Prosecuting Attorney
Bar I.D. No. 24053705

P.O. Box 13046
Austin, Texas 78711
information@spa.texas.gov
512/463-1660 (Telephone)
512/463-5724 (Fax)

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The undersigned certifies that according to the WordPerfect word count tool this document contains 4,888 words.

/s/ John R. Messinger
John R. Messinger
Assistant State Prosecuting Attorney

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The undersigned hereby certifies that on this 26th day of March, 2020, the State's Brief on the Merits has been eFiled and electronically served on the following:

Scott F. Monroe
District Attorney
198th Judicial District
402 Clearwater Paseo Ste. 500
Kerrville, Texas 78028
scottm@198da.com

M. Patrick Maguire
945 Barnett Street
Kerrville, Texas 78028
mpmlaw@ktc.com

/s/ John R. Messinger
John R. Messinger
Assistant State Prosecuting Attorney

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Stacey Soule on behalf of John Messinger
Bar No. 24053705
information@spa.texas.gov
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Associated Case Party: RobertLeeCrider

Name	BarNumber	Email	TimestampSubmitted	Status
Pat Maguire		mpmlaw@ktc.com	3/26/2020 2:27:20 PM	SENT
Kathy Connelly		kathylaw@windstream.net	3/26/2020 2:27:20 PM	SENT

Associated Case Party: State of Texas

Name	BarNumber	Email	TimestampSubmitted	Status
Scott Monroe		scottm@198da.com	3/26/2020 2:27:20 PM	SENT
Theresa Thaler		theresat@198da.com	3/26/2020 2:27:20 PM	SENT
John R.Messinger		John.Messinger@SPA.texas.gov	3/26/2020 2:27:20 PM	SENT